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AUTHOR Evans, William J., Jr.
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ABSTRACT

This chapter examines cases reported during 1988 that involved tort claims within the school context. A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. Negligence is the most common tort alleged to have been committed by school personnel. In the area of products liability, the largest area of litigation continues to involve costs related to asbestos removal. Tort cases discussed in this chapter are organized under the following sections: (1) negligence; (2) educational malpractice; (3) negligence defenses; (4) liability insurance; (5) attorney fees; (6) employee injuries, workers' compensation; (7) defamation; (8) tortious interference with a contract; (9) products liability; (10) construction contracts; and (11) constitutional torts. (MLF)

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TORTS

William J. Evans, Jr.

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INTRODUCTION

A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. State laws provide the basis for most actions, which are predicated on the principle that individuals are

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responsible for the consequences of their conduct.[1] The purpose of tort law is to offer remedies to individuals for harm which resulted from the unreasonable conduct of others. The major categories into which tort actions can be grouped are: negligence, which involves conduct that falls below an acceptable standard of care resulting in injury; intentional torts, where such actions as assault, battery, defamation, trespass, and false imprisonment are committed with the desire to do harm; and strict liability, where an injury results from the creation of an unusual hazard.[2]

Most of the more common torts developed historically and have been recognized for centuries. But tort law is not static and the emphasis on the type of duty owed by one individual to another shifts. For example, plaintiffs which previously might have brought suit claiming intentional infliction of emotional distress or assault and battery today may claim a violation of constitutional rights. In the area of products liability, the largest area of litigation continues to involve costs related to asbestos removal.

This chapter examines cases reported during 1988 which involved tort claims within the school context. Cases involved school officials, employees, and students. Torts arising out of physical education and intramural sports participation are included, but those involving interscholastic or intercollegiate sport participation are discussed in Chapter 6.

NEGLIGENCE

Negligence is the most common tort alleged to have been committed by school personnel. Such a charge can result when an improper act, or a failure to act, causes injury to another person. For negligence to exist, the person causing the injury must fail to exercise a standard of care commensurate with the risks involved and the duty owed to the injured party.

There also must be a causal relationship between the alleged negligent conduct and the injury sustained. In negligence cases, questions of law are determined by judges, while questions of fact are decided by juries.

Student Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases illustrate how injuries to students resulted in a variety of lawsuits with varying outcomes.

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1. *See generally*, W. Prosser, Law of Torts (4th ed. 1971).
2. *See* M. McCarthy & N.H. Cambron-McCabe, Public School Law (1987).

An action was brought against a New York school district for its failure to timely report the results of a scoliosis test performed on a student. The student's condition was aggravated during the intervening fourteen months. The trial court's denial of the school district's motion to dismiss the case was reversed by the appeals court.[3] The court explained that a reading of the provisions of Education Law[4] indicated that the legislature did not intend to impose liability for either the making of tests, for the failure to make tests, or for a failure to report the results of tests. While the law requires school districts to report the results of eye and hearing tests and tests for sickle cell anemia, there was no such requirement for scoliosis.

Off School Property. In Louisiana, the parents of children who were sexually abused by another child brought an action against the school district of the abuser. The parents contended that the district did nothing to control the child's behavior or to warn parents of children who were his potential victims. The trial court's decision for the school district was affirmed on appeal.[5] The incidents had taken place during summer vacation, away from school grounds, and against children who were not students. Furthermore, the plaintiffs were unable to establish that the district was aware of the abuser's problems, and they were unable to cite a statute or case imposing the duty they suggested the school district breached.

While waiting for the school bus, a six-year-old kindergarten student was injured when a rock thrown by an older student hit him in the face. An action for damages was brought against the New York town and school district on behalf of the infant. The plaintiff's appeal of the trial court's summary judgment was unsuccessful.[6] The court saw no breach of duty by the district in the selection of a reasonably safe location for the bus stop. No duty was found owed by the district to prevent older students from mingling with younger students at the same bus stop as the students were not yet under the custody or control of the district. Finally, the conduct of the district was not seen as the proximate cause of the injury. The sole cause was the unforeseeable act of the older student.

A compromise settlement was made between the parents of an injured five-year-old and the Tennessee school district which operated the bus which injured her as she crossed a street. A later action was brought on behalf of the minor seeking to set aside the previous court

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3. Bello v. Board of Educ., 527 N.Y.S.2d 924 (App. Div. 1988).
4. *Id.* at 925.
5. Morris v. Canipe, 528 So. 2d 659 (La. Ct. App. 1988).
6. Fornaro v. Kerry, 527 N.Y.S.2d 61 (App. Div. 1988). *See* Scott v. Blanchet High School, 747 P.2d 1124 (Wash. 1987) (in denying recovery for injuries to a student as a result of an alleged sexual relationship with a teacher, the court held that there had not been a breach of any implied contract to provide morally fit teachers).

approval of the compromise settlement. The decision to set aside the approval and remand the case for trial was affirmed upon appeal.[7] The court explained that fairness and equity demanded that the minor's rights be protected. She had sustained serious injuries and had no representation at the hearing to determine the reasonableness of the settlement.

School Settings During School Hours. Two Pennsylvania elementary school students were sexually assaulted on school grounds by a teacher at their school. The teacher pleaded guilty to charges of involuntary deviate sexual intercourse and was sentenced to prison. Action was brought against the school district asserting state tort and federal civil rights claims. The appeals court upheld the determinations made by the trial court.[8] The district and officials were not within the real property or willful misconduct exceptions to immunity from state tort claims. Although the windows in the office where the students were assaulted were covered with posters, this was not seen as the cause of the injuries. Likewise, the allegations of gross and culpable negligence and wanton and reckless behavior were not seen as the legal equivalent of willful and intentional misconduct. The civil rights claims were not recognized as there was failure to establish intentional racial discrimination, or a special relationship between the students and officials upon which civil rights liability could be based.

Parents of a seven-year-old Louisiana girl, who was abducted from school and raped, sought an increase in the award of $65,000 in medical and general damages.[9] The appeals court upheld the award explaining that the appellants failed to prove that future psychological or psychiatric treatment was more than a speculative possibility.

Parents of a Missouri elementary school student brought suit against the principal for negligent supervision of children. Following a decision in favor of the principal, the parents appealed.[10] The plaintiffs contended that the trial court erred in overruling objections to portions of the defense counsel's closing arguments. In particular, he made reference to the juror's own children and grandchildren which personalized the case and impaired their ability to act impartially. In rejecting that claim, the court recognized that asking jurors to put themselves in the position of a party in question is usually improper. However, with the references made in this instance, the counsel was seen as merely asking the jurors to

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7. Thomas v. R.W. Harmon, Inc., 760 S.W.2d 212 (Tenn. Ct. App. 1988).

8. Scott v. Willis, 543 A.2d 165 (Pa. Commw. Ct. 1988).

9. McGraw v. Orleans Parish School Bd., 519 So. 2d 847 (La. Ct. App. 1988). *See* Olsen v. Special School Dist. No. 1, 427 N.W.2d 707 (Minn. Ct. App. 1988) (statute discounting future damages awarded as a result of injuries incurred by a student in gym class was found not to apply as the case was pending when the law became effective).

10. Haynes v. Green, 748 S.W.2d 936 (Mo. Ct. App. 1988). *See* Steinberg v. Lomenick, 531 So. 2d 199 (Fla. Ct. App. 1988) (jury need not be instructed of evidence of negligence where a defendant violated its own rules of conduct).

use their common sense and familiarity with human traits to guide their deliberations.

The competency of a second-grade student's testimony was the sole issue on appeal of a case involving an Illinois student's injury.[11] He had testified regarding the use of a door which had closed on his hand. The court held that the question of the competency of a child must be raised at the time of trial, not for the first time in a court of review.

The alleged negligence of a Louisiana physical education teacher was at issue following a student's injury. The action alleged that improper instruction and supervision of a wrestling class was the proximate cause of the student's injury. The appeals court affirmed the lower court decision for the school board and teacher.[12] The court found proper the exclusion of witnesses for the plaintiff whose names had not been made available to the defense in a timely manner. Additionally, testimony on how another teacher conducted his class in the year following the accident was excluded as irrelevant. The teacher's methods of teaching his class were not found substandard to the extent that they created an unreasonable risk of injury.

Seven Massachusetts towns formed a regional school district in 1968. Following an assault on a student by a guidance counselor, a complaint alleging negligent hiring and supervision was filed against the towns and members of the regional school district administration. The trial court's dismissal of the action was reversed on appeal, and the case was remanded for further action.[13] The court determined that substantial issues of material fact existed as to whether due care had been exercised in the hiring and supervision of the counselor.

En route to and from School. A seven-year-old girl was killed when she was struck by an automobile at a school crossing. The city had maintained a crossing guard at the site for approximately two and one half years, and had intentionally removed the guard. The girl's parents sued the city for removing the guard without putting into place any warning signs or alternative safeguards. The Texas trial court's summary judgment for the city was reversed by the court of appeals and the case was remanded for trial.[14] The court concluded that the city was not acting solely in its governmental capacity, but was performing proprietary functions as well when it took actions concerning the crossing guard.

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11. Swanigan v. Chicago Bd. of Educ., 527 N.E.2d 1030 (Ill. App. Ct. 1988).
12. Llorence v. Natchitoches Parish School Bd., 529 So. 2d 479 (La. Ct. App. 1988).
13. Doe v. Town of Blandford, 525 N.E.2d 403 (Mass. 1988).
14. Guillory v. City of Beaumont, 746 S.W.2d 16 (Tex. Ct. App. 1988). *See* Pierce County School Dist. v. Greene, 363 S.E.2d 825 (Ga. Ct. App. 1987) (school district's appeal of an award failed as the jury had not been improperly instructed on the legal definition of a crosswalk).

Summary judgment in favor of a Washington school district and crossing guard was denied when a court of appeals reversed a trial court decision.[15] An elementary school student had been struck and killed by an automobile while attempting to cross the street. When the traffic light had turned to walk, the guard signaled across the street for the student to proceed. The crossing guard saw the approaching vehicle, but believed it would come to a stop. The car, which was being operated by an eighty-three-year-old man, never slowed from its approximate speed of thirty miles an hour. The guard's shouts to the student to turn back were ineffective. The appeals court saw issues of genuine common law negligence which served to preclude a summary judgment. The school district argued that the school district stood *in loco parentis* to the child and like a parent was immune from liability based on ordinary negligence. The court disagreed explaining that the correct rule is that a school is liable for its acts or omissions according to the normal rules of tort law.

In a wrongful death action against a Missouri school district and bus driver, the trial court entered a judgment in favor of the defendants. On appeal, that decision was reversed and a new trial ordered.[16] Evidence presented regarding the driver's good character and good driving record were ruled inadmissible. The information on the driver's character was seen as irrelevant in a civil action. The evidence that the driver had a good record did not establish that he was not negligent at the time the fatal accident occurred.

School Buildings and Grounds. A Missouri child, who was playing football on a school playground, was struck and injured by an automobile attempting to park. A suit for injuries was brought against the driver, the school district, and the board of education alleging improper use of the playground. The trial court entered a judgment in favor of the district, board, and driver which was upheld on appeal.[17] The court found the child 100% at fault by having run into the slowly moving car. The school district and board were immune from liability as no defect in the condition of the playground was alleged.

Two 1987 cases dealt with the marking of play areas. In Ohio, a school district was found liable for willful and wanton misconduct in failing to attach a warning flag to a cable at the entrance to a school's

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15. Christensen v. Terrell, 754 P.2d 1009 (Wash. Ct. App. 1988).

16. Williams v. Bailey, 759 S.W.2d 394 (Mo. Ct. App. 1988). *See* Poston v. Barnes, 363 S.E.2d 888 (S.C. Ct. App. 1987) (evidence whether a school district removed seatbelts from a van was ruled admissible on a question of negligence in an accident which injured a student); Lindburg v. Mt. Pleasant Indep. School Dist., 746 S.W.2d 257 (Tex. Ct. App. 1987) (high degree of care is owed to students riding on a school bus rather than the standard of ordinary care).

17. Wilson v. Stephens, 757 S.W.2d 297 (Mo. Ct. App. 1988).

play area.[18] In Louisiana, a knee-high cable fence on school grounds was not found to present an unreasonable risk of harm.[19]

An action was brought on behalf of an Illinois student who was injured when he fell from a slide at school. Appeal was taken when the trial court dismissed the action.[20] The school district was charged with negligence-premises liability in allowing a twelve-foot slide on an asphalt surface without protective padding, or protective railings. Furthermore, the district was alleged to have acted in a willful and wanton manner by consciously allowing the dangerous condition to exist. The appeals court agreed with the lower court determination that the district's conduct did not rise to the level of willful and wanton actions. However, the plaintiffs did prevail on the issues of negligent premises. Allowing the slide on the playground without guardrails was found to disregard the safety of children.

School-related Activities. The lack of supervision of a Louisiana school's playground was established in a case where a student was injured before school started. The school had a breakfast program which began daily a half-an-hour before schoolyard supervision started. The student was injured when he went outside to play after eating breakfast. Although the trial court dismissed the parent's action for damages, that decision was reversed on appeal. The court recognized that the school had no duty to supervise the playground at all times. However, the district was found negligent by failing to either supervise the playground during the breakfast period, or prevent students from going outside during that time.[21]

The plaintiff in an action against an Alabama school board was injured when he fell down an embankment on the grounds of a local high school. He had arrived for the purpose of attending a school-sponsored beauty pageant. He fell after parking his car, but before purchasing his ticket at the school auditorium. The action was centered on the basis of implied warranty and implied contract. In affirming the trial court's decision for the school district, the appeals court explained that the board's liability to persons purchasing admission to school sponsored activities did not apply as the plaintiff was injured prior to paying admission.[22]

EDUCATIONAL MALPRACTICE

The first and most vital teacher duty is to provide students with

18. Highfield v. Liberty Christian Academy, 518 N.E.2d 592 (Ohio Ct. App. 1987).
19. Lejeune v. Acadia Parish School Bd., 517 So. 2d 1030 (La. Ct. App. 1987).
20. Kirby v. Macon Pub. School Dist. No. 5, 523 N.E.2d 643 (Ill. App. Ct. 1988).
21. Laneheart v. Orleans Parish School Bd., 524 So. 2d 138 (La. Ct. App. 1988).
22. Brown v. Covington Bd. of Educ., 524 So. 2d 623 (Ala. Ct. App. 1988).

adequate and proper instruction. There are two basic judicial interpretations of the term instruction. First, students should not be subjected to an activity in school unless first receiving complete instruction from the teacher in how to carry out the activity. Second, teachers owe their students proper instruction that will lead the students to the mastery of certain basic skills and subject matter. This latter type of instruction was at issue in court this past year. The mother of three Washington students brought an action against the school district for failure to provide adequate instruction. The complaint alleged a violation of specific statutes under the Washington Basic Education Act. This included the failure to teach the state constitution. The trial court granted summary judgment to the school district and the mother appealed.[23] The court determined that the allegations did not state a cause of action under the Washington or United States constitutions. Explaining that courts and judges are normally not in a position to substitute their judgment for that of school authorities, the action by the mother was found frivolous. Such a determination allows the court to order sanctions against the party bringing the appeal, including compensatory damages and an award of attorneys' fees to the opposing party.

The mother of a Louisiana kindergarten student brought an appeal of a judgment in an action for damages allegedly resulting from being paddled.[24] In the appeal, the m]other sought to enlarge the pleadings to introduce evidence concerning the evaluation policies for children with special needs or problems. She contended that the school board was negligent in failing to evaluate her son, and as a result he suffered educational damages. The court found no evidence or testimony to conclude there was an enlargement of the pleadings to assert a claim for educational damages. The trial court committed no error for failing to address additional grounds of recovery.

NEGLIGENCE DEFENSES

Immunity

Traditionally, courts have been reluctant to disturb a school district's claim of governmental (sovereign) immunity. School districts are state agencies, created by state law, to perform a governmental function. Although there have been legislative and judicial inroads restricting this defense, it continues to be the one most commonly asserted.

There are a variety of ways in which a statute can limit the liability of a school district. A monetary limit can be placed on the maximum claim

23. Camer v. Seattle School Dist. No. 1, 762 P.2d 356 (Wash. Ct. App. 1988).
24. Abraham v. Lafayette Parish School Bd., 534 So. 2d 49 (La. Ct. App. 1988).

a successful plaintiff can recover, or governmental immunity can be limited by specific statutory exceptions. Litigation in this area generally seeks to test the limits of the statute or its exceptions.

Common Law (Governmental Immunity). A Georgia student was injured when he was thrown from the back of a pickup truck while delivering wrestling mats from one school to another. The school district claimed sovereign immunity as its defense in the action brought by the student. In affirming the trial court's judgment for the district, the appeals court explained the role of insurance coverage.[25] A governmental entity waives its sovereign immunity to the extent of its coverage. As there was no coverage for a particular student claim, there was no waiver of sovereign immunity.

A physically and mentally handicapped child was placed by the school district in a facility owned and operated by the Wyoming Board of Cooperative Educational Services. While there, the child sustained injuries for which his parents sought damages from the school district. The appeals court affirmed the judgment for the school district.[26] For the purposes of the Governmental Claims Act, the Board of Cooperative Educational Services was ruled to be a governmental entity. As such, its employees were not employees of the school district whose liability could be vicariously imputed to the school district.

A Michigan high school senior was killed when she fell from a homecoming float which was being towed to the site of a parade. The school district was charged with negligent supervision in the suit filed on behalf of the student. The trial court's decision finding the school district immune from liability was upheld by the court of appeals.[27] The court saw the school district as impliedly authorized to sponsor a homecoming program which included a parade. Therefore, the district's decision regarding supervision of the event was made within the exercise of its governmental function.

Also in Michigan, a high school had erected speed bumps in the school's driveway. A motorcyclist, carrying a passenger, drove up on the school's sidewalk in order to avoid the bumps. He collided with a truck coming from the opposite direction which had also attempted to avoid the bumps. The passenger on the motorcycle brought suit against the school district for damages resulting from the accident. The trial court found in favor of the district and the passenger appealed.[28] The court of

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25. Dugger v. Sprouse, 364 S.E.2d 275 (Ga. Ct. App. 1988).

26. Sykes v. Lincoln County School Dists. 1 & 2, 763 P.2d 1267 (Wyo. 1988). *See* LeRose v. City of Zion, 696 F. Supp. 1222 (N.D. Ill. 1988) (it was found a matter for trial whether a school district and police officer attached to school district are entitled to immunity in a wrongful death action).

27. Eichhorn v. Lamphere School Dist., 421 N.W.2d 230 (Mich. Ct. App. 1988).

28. Scamehorn v. Bucks, 421 N.W.2d 918 (Mich. Ct. App. 1988).

appeals affirmed that decision finding that the speed bumps were fit for the use for which they were intended and therefore did not create a defect in a public building exception to the district's immunity. Additionally, the accident was seen as a result of an intention to avoid using the bumps for their intended purpose.

A Virginia physical education teacher was charged with negligence after a student was injured in class while playing football without protective equipment. The trial court's decision that the teacher was protected by the doctrine of sovereign immunity was affirmed on appeal.[29] The court explained that the teacher was an employee of an immune governmental entity charged with simple negligence in the supervision and control of the class to which he was assigned. The facts were not found to support a charge of gross negligence or intentional misconduct.

A Michigan student who injured his hand on a milling machine during shop class brought an action against the school. He claimed that the machine was not equipped with the proper safety guard, and as such fell under the real property exception to immunity. The trial court disagreed and granted summary judgment in favor of the school. That decision was reversed on appeal.[30] The court accepted that the 1,000 pound milling machine was a part of the reality, even though it was only attached by its weight and through its electrical connection. As schools are liable for injury resulting from dangerous or defective conditions in their buildings, the case was remanded for further consideration.

The real property exception also was at issue in two Pennsylvania cases. The results, however, were different. In the first, a student was injured while attempting to hang on a chin-up bar. The bar, which was located in the arch of a doorway leading to a gymnasium storeroom, became dislodged and struck the student in the face and mouth. Summary judgment was granted in favor of the school district by the trial court. That holding was affirmed on appeal with the court determining that the bar was movable and therefore not a fixture which would place it under the real property exception to immunity.[31]

In the other case, a sixteen-year-old student was rendered a quadraplegic when he fell from a set of gymnastic rings during his gym class. In his action against the school district, the appeals court affirmed the trial court's summary judgment for the district.[32] The court held that the real estate exception can only be applied in cases where the artificial condition or defect of the land itself is the cause of the injury. It does not apply in instances where it only facilitates the acts of others, as in this case

29. Lentz v. Morris, 372 S.E.2d 608 (Va. 1988).
30. Velmer v. Baraga Area Schools, 424 N.W.2d 770 (Mich. Ct. App. 1988).
31. Gore v. Bethlehem Area School Dist., 537 A.2d 913 (Pa. Commw. Ct. 1988).
32. McCloskey v. Abington School Dist., 539 A.2d 946 (Pa. Commw. Ct. 1988).

where the injury was a result of the student's own actions.

Statutory Immunity. Following an injury to a student participating in an Illinois physical education class, suit was brought for recovery of medical bills. Named were the instructor, superintendent, principal, and their immediate inferiors. The appeals court affirmed the decision that since the teacher and the administrators were statutorily immune from liability, such immunity extended to their immediate inferiors.[33] The plaintiffs had charged that certain nonteaching personnel had failed to properly forward doctor's notes exempting the student from physical education class.

A North Carolina substitute teacher was accused by students of physical abuse while disciplining them. The school's principal reported the accusations to the Department of Social Services and the Assistant Superintendent of Personnel. Following a police investigation, the teacher was charged with assault. After being acquitted, the teacher charged the principal with malicious prosecution, defamation, intentional infliction of emotional distress, and negligence for reporting the allegations. The trial court found for the principal, and the teacher appealed.[34] The appeals court affirmed the decision citing the statutory immunity from civil and criminal liability to anyone who makes a report or otherwise participates in a program for reporting suspected child abuse.

Other Defenses

Notice of Claim. A New York teacher injured her back while lifting two boxes of teaching material. The workers' compensation board excused her failure to give timely notice and the school district appealed.[35] The court upheld the board's ruling since the teacher had sought prompt medical treatment, and the initial request for verification of the incident was rejected by the school official to whom it had been reported.

Suit was brought against a Nebraska school district for the amount due on material supplied to a private contractor hired by the district to renovate a school building. The district had failed to comply with the statutory requirement that a contractor's bond be posted to protect the material supplier's interest. The district court dismissed the action for lack of jurisdiction. That decision was reversed by the appeals court, citing the applicability of the Political Subdivisions Tort Claims Act.[36] Notice of the claim was found timely and the district was held liable.

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33. Hopwood v. Elmwood Community High School Dist. 322, 525 N.E.2d 247 (Ill. App. Ct. 1988).
34. Davis v. Durham City Schools, 372 S.E.2d 318 (N.C. Ct. App. 1988).
35. Yagaloff v. Lincoln Hall, 525 N.Y.S.2d 379 (App. Div. 1988).
36. Chicago Lumber v. School Dist. No. 71, 417 N.W.2d 757 (Neb. 1988).

A white Massachusetts high school student was involved in two fights at school. Press reports linked the fights to racial tensions. One article, which was carried by a national wire service, falsely reported statements portraying the student as a racist and member of the Ku Klux Klan. The student brought an action against the news media for libel, infliction of emotional distress, invasion of privacy, and violation of civil rights. The appeals court upheld the lower court decision that the student's action was barred by the three-year statute of limitations.[37] Although the student claimed not to know of the wire service article until six years after it was published, neither the harm nor the article was found inherently unknowable at the time of publication.

The father of a Massachusetts second-grade student brought an action against the town for damages for injuries received by the student during a school-yard incident. The appeals court upheld the trial court decision absolving the town from liability. The function of supervising students in the school yard was seen as discretionary and therefore an exception to the Tort Claims Act. This exception was not seen to apply to the charge that school personnel failed to seek immediate medical attention for the student. However, the presentment letter giving notice to the town had not stated that claim. The purpose of presentment is to insure that the responsible public official receives notice of a claim so that the official can investigate its validity, and take steps to ensure that similar claims will not be brought in the future. The court held that, having deprived the town of these opportunities, an action on a theory of failure to provide medical attention could not be maintained.[38]

An applicant for a Wyoming teaching position brought an action against the school principal alleging breach of an implied contract of employment. The trial court denied that claim on the basis that the action was barred by the Governmental Claims Act statute of limitations. That decision was reversed on appeal.[39] The court held that by offering a teaching position, without the approval of the Board of Trustees, the principal had acted outside the scope of his duties. Therefore, the one-year statute of limitations was not applicable.

A woman who slipped on a damp spot in a New York school's hallway sought leave to serve a late notice of claim for her injuries. The

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37. Flynn v. Associated Press, 519 N.E.2d 1304 (Mass. App. Ct. 1988).

38. Wightman v. Town of Methuen, 526 N.E.2d 1079 (Mass. App. Ct. 1988).

39. Milton v. Mitchell, 762 P.2d 372 (Wyo. 1988). *See* McKenna v. Prudential Ins. Co. of Am., 539 A.2d 1266 (N.J. 1988) (school board's failure to notify an employee that his retirement was approved served to extend the period during which he could convert his death benefit); Scott v. Burden, 527 So. 2d 468 (La. Ct. App. 1988) (21 months following the incident the school board can still be added as a joint tort-feasor with the parents of a student who stabbed a classmate).

appeals court affirmed the denial of her application.[40] The woman had retained counsel well within the ninety-day period for serving a notice of claim. The court cited the transitory nature of the condition which allegedly caused the action, as well as the failure to provide a valid excuse for the delay.

Comparative Negligence. An Illinois high school student was awarded $16,000 in damages for injuries sustained when she stepped from a school bus and was struck by a pickup truck. In seeking to have the amount of the judgment raised, she submitted medical bills totaling over $13,000. The court of appeals held that the award was not inadequate, even if it was not generous. Although the award had been cut by 80% based on comparative negligence, the court explained that even if the jury's verdict had been less than the claimed damages it would not necessarily be considered inadequate.[41]

The jury instructions given by a Missouri court were at issue in a case where a student was injured when he rode his bicycle into a cable placed across the entrance to a school's playground. In upholding the school district's right to a new trial, the appeals court held that comparative negligence instruction describing the acts by the student was not supported by the evidence. The language of the instructions was found to have likely had a prejudicial impact.[42]

A New York school employee sought damages for an alleged sexual assault on school grounds. After the trial court decision for the school board, the employee sought appeal on the grounds of an improper charge to the jury. Specifically, the employee objected to the charge on comparative negligence.[43] The appeals court affirmed the decision, noting that the employee had indicated her fear concerning her safety in the building during off-hours. It was found reasonable for the jury to examine the employee's obligation to ascertain who was knocking at her door prior to unlocking and opening it.

LIABILITY INSURANCE

The interpretation of policy language was the primary issue in a case where an employee in Washington brought an action to recover for the

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40. D'Andrea v. City of Glen Cove Pub. Schools, 533 N.Y.S.2d 456 (App. Div. 1988). *See* LaCroix v. Board of Educ., 844 F.2d 88 (2d Cir. 1988) (action brought 15 years after the termination of a contract was untimely and not subject to the Accidental Failure of Suit Act where the plaintiff chose not to pursue the claim when he had the chance). For two cases decided on largely technical grounds, *see* Airefco, Inc. v. Yelm Community Schools No. 2, 758 P.2d 996 (Wash. Ct. App. 1988); McPherson v. Brownard County School Bd., 527 So. 2d 238 (Fla. Dist. Ct. App. 1988).

41. Collins v. Straka, 517 N.E.2d 1147 (Ill. App. Ct. 1987).

42. Nakata v. Platte County R-3 School Dist., 750 S.W.2d 699 (Mo. Ct. App. 1988).

43. Louise B.G. v. New York City Bd. of Educ., 533 N.Y.S.2d 293 (App. Div. 1988).

loss of function of his foot due to a spinal injury.[44] The policy caption indicated that coverage was only for accidental death and dismemberment. In holding for the employee, the court explained that a caption should never of itself be taken to override the intention of the parties to an insurance policy. If a policy is ambiguous, a meaning and construction most favorable to the insured must be applied.

A Pennsylvania school district brought an action against its liability insurer for breach of contract. Shortly after the insurers were awarded the contracts, they cancelled the policies pursuant to the cancellation clause. This necessitated the school district to obtain coverage from another insurer at a substantially higher rate. In its suit, the district sought reimbursement for the difference in rates. The trial court's dismissal of the action was affirmed upon appeal.[45] The court explained that even though the original bid specification did not contain cancellation provisions, the policies properly provided such clauses as required by insurance company law.

In an effort to recover policy proceeds, the wife of a deceased Illinois school district employee brought an action against the insurer, school district, and various officials. After a settlement and dismissal of claims against the district and the officials, the trial court found for the insurer. That decision was upheld by the appellate court which found that the beneficiary had failed to comply with notice and proof of claim provisions of the policy.[46] Although the wife did not become aware of the policy issued by the school district until the one year claim period had passed, she failed to file a claim until nearly three years later.

A New York school board alleged breach of contract when its liability insurer failed to pay the board's expenses for defending against a segregation suit.[47] In appealing the trial court's decision for the board, the insurer claimed the policy excluded defense costs attributable to racial discrimination claims. The court of appeals disagreed, recognizing two classes of expenses. Legal fees were seen to accrue from the outset

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44. Stanley v. SAFECO Ins. Co. of Am., 747 P.2d 1091 (Wash. 1988). *See* Allstate Ins. Co. v. Diamant, 518 N.E.2d 1154 (Mass. 1988) (court held that "bodily injury" and "personal injury" are not synonyms in insurance law—bodily injury is a narrower term which does not encompass emotional distress); Continental Casualty Co. v. McAllen Indep. School Dist., 850 F.2d 1044 (5th Cir. 1988) (board of education's liability policy excluded coverage for student's injury although the board argued the claim was constitutional and not subject to exclusion).

45. Clairton City School Dist. v. Mary, 541 A.2d 849 (Pa. Commw. Ct. 1988). *See* Dayton Indep. School Dist. v. National Gypsum Co., 682 F. Supp. 1404 (E.D. Tex. 1988) (insured manufacturer of asbestos, who settled claims brought against it by school districts, was granted indemnification from excess liability insurers).

46. Fletcher v. Palos Community Consol. School Dist., 518 N.E.2d 363 (Ill. App. Ct. 1987).

47. Board of Educ. Yonkers City School Dist. v. CNA Ins. Co., 839 F.2d 14 (2d Cir. 1988).

of a dispute and therefore differ from expenses for remedial programs which become necessary only after discrimination has been established.

The dismissal of an employee resulted in a successful civil rights action against a Wyoming school district. A further action developed over the question of whether the school board was covered under its liability policy. The trial court's decision for the school board was reversed on appeal.[48] The insurance policy language denying coverage was found clear and unambiguous. Since the members of the school board were not individually liable in the civil rights judgment against the school district, the district had no need to indemnify them. The policy, which was limited to indemnity did not cover the judgment.

Five children and one teacher were killed when a hot water heater in an Oklahoma elementary school exploded. Parents of children who were killed or injured brought suit against the school district, three employees, and various manufacturers. The insurance carrier tendered $300,000 to the court as the school district's maximum liability required by the district's insurance policy. The district court ruled that the payment, once divided among the various plaintiffs, relieved the defendants of all liability. The plaintiffs appealed, but the decision was upheld by the Oklahoma Supreme Court.[49] A legitimate governmental purpose was seen in imposing a limit on the amount of damages recoverable from governmental entities. The court also recognized that perfect equality of treatment in the awarding of damages to the victims of governmental tortfeasors could never be achieved. Thus, a legislative decision to limit liability to a specified sum for two or more persons injured in a single accident was seen to bear a reasonable relationship to a legitimate government goal. Finally, the doctrine of sovereign immunity was not found to violate due process rights, where children can be compelled to attend school and yet have liability limited when they are injured.

ATTORNEY FEES

A New York teacher, who had successfully defended himself against a criminal charge of sexual abuse of a student, brought an action against his school district to recover for legal fees. The teacher appealed the trial court's dismissal of the case.[50] The court found the dismissal proper, as

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48. St. Paul Fire & Marine v. Albany County School Dist. No. 1, 767 P.2d 1255 (Wyo. 1988).

49. Wilson v. Gipson, 753 P.2d 1349 (Okla. 1988). *See* Wilson v. Unsatisfied Claim and Judgment Fund Bd., 536 A.2d 752 (N.J. 1988) (passenger in an uninsured vehicle may recover personal injury protection from the Unsatisfied Claim and Judgment Fund despite the availability of a claim against a driver who was insured by the school district).

50. Lamb v. Westmoreland Cent. School Dist., 533 N.Y.S.2d 157 (App. Div. 1988).

the district's statutory authority to defend a teacher in a criminal action only arises out of disciplinary action taken against a pupil. Without such authority, a public employer who paid attorney fees for its employee's legal actions would be making a gift of public funds for a private purpose. The court explained that this would be prohibited, even if the actions arose from acts performed in the employee's legal capacity.

EMPLOYEE INJURIES/WORKERS' COMPENSATION

A New York City teacher, who was injured while trying to break up a fight between two high school students, used a novel approach in an attempt to recover damages from a governmental entity.[51] Failing to establish that his status as an employee created a requisite special duty to protect him from the students, the teacher addressed another of the city's roles. He claimed that as a landlord, the defendants were negligent by placing the students in the same classroom thus creating an unsafe workplace. The appellate court upheld the trial court's decision to dismiss the claim, explaining that the classroom assignment of students was an educational decision with no connection to the defendant's function as a landlord.

A cafeteria worker in Texas was injured when she received an electrical shock to her left hand. In upholding her claim, the court determined that expert testimony was not necessary to establish that injury to her right hand was caused by the shock to her left hand.[52]

An Oregon school employee injured her hips when she slipped on some steps. The Workers' Compensation Board allowed medical treatment, but denied a claim of partial permanent disability. The employee sought further medical treatment when her condition worsened. The appellate court held that the original finding did not bar an assertion of later claims for medical expenses.[53]

A Louisiana school janitor, who suffered a heart attack two days after complaining of chest pains, sued to recover workers' compensation benefits, medical expenses, attorney fees, and penalties. The trial court awarded the worker everything except the penalties and attorney fees.

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51. Bisignano v. City of N.Y., 524 N.Y.S.2d 49 (App. Div. 1988). *See* Johnson v. Harlan Community School Dist., 427 N.W.2d 460 (Iowa 1988) (subrogation rights of employer and insurance carrier included the cost of medical and hospital services paid to the employee); Bentler v. WCAB, 550 A.2d 854 (Pa. Commw. Ct. 1988) (insurer was allowed to bring subrogation claim on decedent's estate after the estate received a wrongful death settlement from the school district).

52. Houston Indep. School Dist. v. Harrison, 744 S.W.2d 298 (Tex. Ct. App. 1987).

53. North Clackamas School Dist. v. White, 752 P.2d 1210 (Or. Ct. App. 1988). *See* DeSylvia v. Multnomah City School Dist., 755 P.2d 147 (Or. Ct. App. 1988) (insurer at the time a claimant originally injured his elbow was responsible for the condition that developed sixteen years later).

That decision was upheld on appeal.[54] The court held that the school district's dispute of the claim was not arbitrary and capricious since evidence existed to support both sides of the dispute.

A Pennsylvania head of custodians petitioned for review of the decision by the Workmen's Compensation Appeal Board to dismiss his claim of occupational disease. The court upheld that decision, finding no evidence of exposure to coal dust after the occupational disease provisions went into effect in 1973.[55] The claimant had worked as a coal miner prior to his employment by the school district, and had been regularly exposed to coal dust in years prior to 1973.

Two Pennsylvania physical education teachers became involved in a tugging match over a typewriter. After one teacher was knocked off balance and into a plate glass wall, she filed suit for injuries against the other teacher and school district. In affirming the trial court's decision for the worker, the appeals court held that injuries sustained by a worker engaged in conduct normally not expected in the workplace did not bar remedy by the Workers Compensation Act.[56]

A Michigan court of appeals reversed the Workers' Compensation Appeal Board, and remanded the case for further fact-finding in an instance involving a mechanic who had been injured while working for a school district.[57] The court held that the worker's failure to even attempt to perform work which he was known to be capable of performing, did not preclude him from receiving compensation benefits if he was disabled on a psychological basis.

A Colorado jury awarded a former school custodian damages for mental suffering and mental suffering caused by breach of contract. The school district was unsuccessful in its appeal of the award.[58] The court addressed the two areas of alleged mental suffering. The damages for mental suffering which arose from the direct consequence of the school district's breach of contract were not found to be barred by the Governmental Immunity Act. The damages were not seen to lie in tort, but arose as a direct consequence of the district's breach of contract. For the outrageous conduct by the defendants during the course of the custodians employment, the Workers' Compensation Act was found to be the proper remedy.

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54. Savoy v. Cameron Parish School Bd., 524 So. 2d 820 (La. Ct. App. 1988). *See* Grimes v. Leon County School Bd., 518 So. 2d 327 (Fla. Dist. Ct. App. 1987) (worker wearing leg brace as a result of polio was entitled to compensation for injuries incurred when the brace gave way at work).

55. Sulyma v. WCAB, 545 A.2d 485 (Pa. Commw. Ct. 1988). *See* Babin v. LaFayette Parish School Bd., 534 So. 2d 124 (La. Ct. App. 1988) (workers' compensation benefits stopped when medical evidence indicated no further disability).

56. Ruparcich v. Borgman, 547 A.2d 1279 (Pa. Commw. Ct. 1988).

57. Parmeter v. Grand Rapids Pub. Schools, 424 N.W.2d 6 (Mich. Ct. App. 1988).

58. Hoffsetz v. Jefferson County School Dist. No. R-1, 757 P.2d 155 (Colo. 1988).

An Ohio school janitor appealed a trial court order denying her compensation for psychological injuries.[59] The court of appeals held that the injury, allegedly caused by verbal and psychological harassment by the school principal, was mental and not physical in nature. Such injury, the court explained, is not compensable under Ohio statutes.

DEFAMATION

Prior to his election, a South Carolina school board candidate had business dealings with the school district. Such activities were prohibited for board members, but not for candidates. After his election, the board member brought a libel action against a newspaper which had erroneously reported that his prior business dealings with the district were illegal. The court dismissed the action citing the failure to show that the newspaper acted with actual malice.[60] Failure to investigate does not in itself establish bad faith. There was not sufficient evidence that the newspaper knew the article was false or entertained serious doubts about its truthfulness.

A Connecticut superintendent of schools brought an action for libel against a newspaper which published an editorial following his appearance on a radio show. The newspaper made statements concerning the superintendent's views on pupils with AIDS, and his alleged efforts to block the reporting of public correspondence with the school district. The court held that the positions taken in the editorial were pure opinion and involved matters of public concern; accordingly, the statements were constitutionally protected.[61]

A libel action against a New York social worker and school district was brought by the step-grandfather of a fourteen-year-old girl for the dissemination of a report alleging his sexual abuse of the girl. The action sought damages for the publication of the report to the county Child Protective Services and the school's Committee on the Handicapped. The trial court's denial of a motion for dismissal was appealed by the district and the social worker.[62] In reversing that decision, the court explained that the complete absence of malice on the part of the defendants entitled them to qualified immunity from civil liability. Although the report was found to be false, communication of such information, in good faith, to authorized recipients, was found to warrant such protection.

Also in New York, a former teacher brought an action claiming

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59. Wolf v. Northmont City Schools, 528 N.E.2d 589 (Ohio Ct. App. 1988).
60. Peeler v. Spartenburg Herald-Journal, 681 F. Supp. 1144 (D.S.C. 1988).
61. Dow v. New Haven Indep. Inc., 549 A.2d 683 (Conn. 1987).
62. Dunajewski v. Bellmore-Merrick Cent. High School Dist., 526 N.Y.S.2d 139 (App. Div. 1988).

denial of his civil rights based on the presence of allegedly false and defamatory charges in his personnel file. After the district court granted summary judgment for the school board, the plaintiff successfully appealed.[63] The court of appeals held that, although the stigmatizing charges had not been disclosed, the teacher could prevail if he could show the likelihood of future disclosure. When the teacher was unable to make that showing to the district court, he again appealed. This time the court of appeals upheld the lower court decision agreeing that there no longer existed a likelihood that the allegations would ever be made public. Prior to the second appeal, the superintendent had directed that the allegations be deleted from the personnel file, and ordered his subordinates not to reveal to prospective employers the allegations which led to the teacher's termination.

A Pennsylvania substitute teacher brought a defamation action against the school district and its business manager. The teacher had twice applied for unemployment benefits over the objection of the district. The district's defense in both instances was that the teacher had not been available for work when called. The defamation claim was based on a letter from the business manager terminating the services of the teacher and attributing the action to misconduct. The trial court's decision for the district was upheld by the appeals court.[64] The court agreed that the term "misconduct" could be considered defamatory when considered in the abstract, but in this instance was mere opinion. As such, the court explained, it would only be actionable if it implied the allegation of undisclosed defamatory facts as the basis for the opinion.

A Missouri sex education teacher brought a libel and slander action against a guest on a call-in radio show. The defendant had asserted that the teacher probably derived a type of sexual gratification from providing titillating information to students. On appeal, the trial court's decision for the defendant was upheld.[65] The statement was seen as a matter of opinion, and thus could not form the basis for an award for damages for either an intentional infliction of emotional distress or an invasion of privacy.

A former Pennsylvania vice-principal brought a defamation suit against the principal, superintendent, school board, and individual members of the school board based on the principal's evaluation and the vice-principal's subsequent discharge. In the evaluation and at a subse-

63. Brandt v. Board of Coop. Educ. Servs., 845 F.2d 416 (2d Cir. 1988).

64. Goralski v. Pizzimenti, 540 A.2d 595 (Pa. Commw. Ct. 1988).

65. Deupree v. Iliff, 860 F.2d 300 (8th Cir. 1988). *See* Mahoney v. Adirondack Publishing Co., 523 N.Y.S.2d 480 (App. Div. 1987). The decision in this libel action brought by high school football coach was reversed. Although the newspaper article describing the coach's sideline behavior was found to be false and defamatory, actual malice was not established.

quent school board meeting the plaintiff had been characterized as inept, insubordinate, and inattentive. The trial court dismissed all of the actions upon a plea of immunity. On appeal, the court found the principal and superintendent immune from liability. However, statements made by one school board member were seen as likely to infer that he was privy to undisclosed facts concerning the plaintiff's performance. Therefore, the case was remanded for further proceedings.[66]

TORTIOUS INTERFERENCE WITH A CONTRACT

In Texas, a former teacher brought an action against her school district, superintendent, and principal alleging intentional interference with her teaching contract. She claimed that a demotion and failure by the principal to provide her with the document needed to take a teacher competency test, as well as other incidents, culminated in her submitting her resignation. The district court granted summary judgment to the defendants and the teacher appealed.[67] The appellate court reversed that decision finding that the defendant's actions had interfered with the teacher's contractual rights. The essential elements of the cause of action were that: (1) there was a contract subject to interference, (2) the interference was willful and intentional, (3) the intentional act was the proximate cause of the teacher's damage, and (4) actual damage or loss occurred.[68] The court disagreed with the defendants that the teacher had failed to exhaust administrative remedies or that they were protected by good faith immunity.

An antitrust suit was brought against a West Virginia high school principal and the county board of education by a photographer. He claimed that conspiratorial actions had been taken to interfere with his business. At trial, an award was made representing actual damages as a result of actions taken by the principal to prevent students from having their yearbook pictures taken by the photographer. Because West Virginia law provides for triple damages in antitrust suits, the court entered a judgment for that amount. On appeal, the court found that the plaintiff failed to prove a conspiracy in restraint of trade.[69] Specifically, the actions by the principal against the photographer did not meet the test of being a concerted action between two or more distinct economic entities.

A successful applicant for a Delaware principalship brought suit alleging breach of contract against the school district and school board members. There was a refusal to honor the contract following discussion of unfavorable information concerning the appointee. The district court

66. Malia v. Monchak, 543 A.2d 184 (Pa. Commw. Ct. 1988).
67. Stimpson v. Plano Indep. School Dist., 743 S.W.2d 944 (Tex. Ct. App. 1987).
68. *Id.* at 945.
69. Gray v. Marshall County Bd. of Educ., 367 S.E.2d 751 (W. Va. 1988).

denied the board's motion for summary judgment. The plaintiff was found to have a protected property interest in his employment which entitled him to notice and the opportunity to be heard prior to termination.[70]

PRODUCTS LIABILITY

Thirty-four Illinois public school districts were required by the Asbestos Abatement Act to replace all asbestos-containing products in their buildings. For this, they were entitled to some reimbursement from the state. Naming seventy-eight defendants which either mined, manufactured, installed, or sold the product, the districts sought full reimbursement and other damages. The trial court granted the suppliers motion to dismiss the case and the school districts appealed. The court of appeals reversed the decision and remanded the case for trial.[71] The districts were found to have sufficiently established physical injury, stated a cause of action in restitution, proved fraudulent and negligent misrepresentation, and maintained a breach of warranty claim.

A Pennsylvania school district filed a motion to reopen a judgment against asbestos manufacturers after federal and state authorities found asbestos in its buildings.[72] The court denied the motion explaining that the school district could not bring suit based on newly discovered asbestos following an earlier incomplete investigation. The district's failure to discover identifiable asbestos in its earlier suit was seen as due to its own lack of diligence.

Asbestos exposure also was at issue in a Missouri case where a school district attempted to recover the costs of removing asbestos-contaminated ceiling tiles from seven school buildings. In addition, the district sought punitive damages on the theory that the manufacturer knew of the defect and danger associated with the tiles and, in selling them, showed a complete indifference for the safety of others. The trial court allowed the jury award for actual damages, but not those considered punitive. That decision was upheld on appeal.[73] The punitive damage claim in a strict liability case is based on the fact that the defendant should have known of the dangerous defect in its product. After discovery of the potential danger related to the school ceilings, the district

70. Kirschling v. Lake Forest School Dist., 687 F. Supp. 927 (D. Del. 1988).

71. Board of Educ. v. A, C, and S, Inc., 525 N.E.2d 950 (Ill. App. Ct. 1988). *See* Hebron Pub. School Dist. No. 13 v. United States Gypsum, 690 F. Supp. 866 (D.N.D. 1988) (school district's claim against asbestos manufacturer was upheld even though the district removed the asbestos rather than request the manufacturer do so).

72. Catasauqua Area School Dist. v. Eagle-Picher Indus., 118 F.R.D. 566 (Pa. 1988).

73. School Dist. of Independence v. United States Gypsum, 750 S.W.2d 699 (Mo. Ct. App. 1988).

used a heavy paint on the tiles for the purpose of encapsulation of asbestos fibers. However, this allowed a heavier than normal water backup behind the painted surfaces which made leaks more serious than had been previously experienced. Ultimately, the school board voted to remove the asbestos-containing material. The appeals court found no evidence that the asbestos manufacturer knew at a relevant time that water damage to the ceiling tiles would release asbestos into the air.

In the only 1988 products liability case not related to asbestos, it was deemed a matter for the jury as to whether a manufacturer had the duty to warn of the possibility of eyeglasses shattering while a student played volleyball in gym class.[74]

Construction Contracts

A Louisiana appeals court affirmed a decision that a school board had to pay the balance due on construction of a school.[75] The decision was amended significantly, lowering the amount due. The contractor claimed that he should be excused for twenty of the days the construction was delayed, and for which he was penalized. The court disagreed, finding that rain and cold during one month of a thirteen-month contract period did not justify the delay in performance.

A Wyoming plumbing and heating contractor alleged that his rejection as a subcontractor on a school construction project deprived him of a constitutionally protected property interest. The appeals court upheld the trial court decision denying this claim.[76] Wyoming law did not recognize a protected property interest in relation to a right to bid on public projects. Correspondence from the school district to the contractor may have fostered an expectancy that a bid would be considered, but did not provide a legitimate claim of entitlement to any such consideration.

Constitutional Torts

During a Connecticut school board meeting, a debate ensued among members of the board concerning the acting chairman's right to serve out the remainder of the outgoing chairman's term. After the debate had continued for some time, a member of the audience rose and made comments critical of the positions taken by one faction of the board. A shouting match developed between the speaker and one of the board

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74. Boudreau v. Jack Eckerd Corp., 854 F.2d 85 (5th Cir. 1988).

75. S.J. Lemoine v. St. Landry Parish School Bd., 527 So. 2d 1150 (La. Ct. App. 1988).

76. Teton Plumbing & Heating v. Laramie County School Dist., 673 P.2d 843 (Wyo. 1988). *See* Rice v. Scott County School Dist., 526 N.E.2d 1173 (Ind. Ct. App. 1988) (there is no constitutionally protected property interest in a government contract sought by a disappointed bidder).

members who ordered the audience member to be quiet. Ultimately, the police were summoned to remove the speaker. The board member claimed qualified immunity in seeking reversal of the district court's decision that his actions violated the speaker's first amendment guarantee to freedom of speech. Under the doctrine of qualified immunity, a government official is protected from personal liability to the extent that the discretionary functions he performs do not violate clearly established statutory or constitutional rights. The court of appeals upheld the district court in determining that the board member was not shielded from liability.[77] As a general rule, state action that regulates speech on the basis of its content is prohibited by the first amendment. The actions taken at the school board meeting were clearly seen to have constituted state action. Even though the government may subject speech to valid time, place, and manner restrictions, such regulation is particularly restricted when the speech occurs in a place where public speech is usually allowed.

Georgia peace activists were granted the right to participate in a high school career day in a previous decision.[78] At that time, the court deferred the question of whether the activists could discuss the merits of military service. Upon remand, the court held that regulations prohibiting participants in "Career Day" or "Youth Motivation Day" programs from criticizing opportunities offered by others violated the first amendment.[79] Additionally, since content-based restrictions were not found to serve a compelling state interest, they cannot limit activist's access to guidance offices and bulletin boards.

A Tennessee parent objected to the reading series adopted by the board of education and used by her child's school. Objection was made to alleged endorsement of secular humanism, evolution, and non-Christian beliefs by the series. For a time, the parent took her child out of class during the period alloted for reading instruction, and taught her daughter in the school library. She made use of books from an older reading series with which she had no objection. When the board of education passed a resolution requiring all students to use the approved books, the mother was told her daily practice of taking her daughter from reading class violated board policy. Additionally, she would no longer be allowed to use the school's facilities to teach her daughter. Rather than discontinue

77. Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988). *See* Piver v. Pender County Bd. of Educ., 835 F.2d 1076 (4th Cir. 1987) (teacher's speech supporting tenure for his principal was found related to a matter of public concern and therefore protected by the first amendment); Zuber v. Bordier, 522 N.Y.S.2d 610 (App. Div. 1987) (parent's statements concerning a teacher's competence were constitutionally protected expressions of opinion not supporting the teacher's action for the intentional infliction of emotional distress).

78. Searcey v. Crim, 815 F.2d 1389 (11th Cir. 1987).

79. Searcey v. Crim, 681 F. Supp. 821 (N.D. Ga. 1988).

the lessons, the mother took the child to the school parking lot for the instruction. Following the refusal to stop the practice and leave the school grounds, the parent was arrested and spent about three hours in jail. Almost a year later, after having removed her daughter from the school, the parent filed suit. The mother alleged that her expression of ideas was restrained, that she was denied the custody of her daughter without due process, that her right to speak symbolically was suppressed, and that she was falsely arrested, prosecuted, and imprisoned. Essentially, her claim was a denial of her first and fourteenth amendment rights. Following a jury trial in which damages were awarded to the mother, the school district appealed.[80] The court failed to agree that there had been a deprivation of the mother's constitutional rights. There was no evidence that she had been prevented from expressing her views at school board meetings. She had been given notice that she would no longer be permitted to remove her daughter from the regular reading class. Despite this knowledge, she chose to send her daughter back to the school and to continue her disruption of the school's normal routine.

Student Initiated Cases

A decision to discipline a student, which results in the use of excessive force causing appreciable physical pain, can constitute an invasion of the student's fifth amendment liberty interest in his personal security. Such action could also constitute a violation of substantive due process prohibited by the fourteenth amendment. Parents of a Pennsylvania student alleged that acts of their son's teacher were of such a nature. During a swimming class, the teacher overheard the student using inappropriate language. He walked behind him and placed his arms around the student's neck and shoulders. While holding and lifting the student, the teacher questioned him regarding the use of language. When he released him, the student fell face down on the pool deck suffering injuries requiring hospitalization. The trial court found for the school district, and the parents appealed. In reversing that decision and remanding the case, the court of appeals held that it was a matter for a jury whether the actions taken by the teacher exceeded the degree of force needed to correct the breach of discipline.[81]

Two Arkansas students brought an action against their school district claiming violation of their constitutional rights to due process as a result of punishments administered while they were in school.[82] The first

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80. Frost v. Hawkins County Bd. of Educ., 851 F.2d 822 (6th Cir. 1988).

81. Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988).

82. Wise v. Pea Ridge School Dist., 855 F.2d 560 (8th Cir. 1988). *See* State v. Brooks, 741 S.W.2d 920 (Tenn. 1987) (statute prohibiting carrying a weapon on school grounds was not found to be overbroad in violation of due process).

student had participated in an impermissible and dangerous game during physical education class. He received corporal punishment in the form of "two licks" on the buttocks with a wooden paddle. The second student was placed in in-school suspension for three days as a result of unexcused lateness to school on seven occasions. In both instances, the district court decision for the school district was upheld. The punishments were not found to have violated the students' due process rights, or to be excessive. Rather, they fell within common law privilege.

Regarding the corporal punishment, the court explained that it would be a deprivation of substantive due process only if it had been arbitrary, capricious, or wholly unrelated to the school's goal of maintaining an appropriate learning environment. Likewise, the in-school suspension was not found to be a due process violation. Both the student and his mother were aware of the consequences of unexcused tardiness, and neither had attempted to explain them.

Two Mississippi students alleged that their constitutional rights to equal protection of law and procedural due process were violated when they were suspended for misconduct.[83] On the due process claim, the district court denied school officials a summary judgment on the claim of one student. It remained to be determined whether the suspension, which included three days out of school and seven days in-school, would require the more formal procedures required for long-term suspensions. The claim by the other student was denied as she admitted the improper conduct thus obviating the need for a due process hearing. On the equal protection claim, once again the court denied summary judgment on the claim of the first student. It had yet to be determined whether nonathletes, such as the student in question, were punished while athletes committing similar infractions were not. The claim by the second student was denied with the court noting that merely because some offenders escape punishment does not deny equal protection to those punished. Both students claimed that when their arms were grabbed their rights under the fourth and eighth amendments were violated. The court held that these actions, in one case to stop the student from entering a classroom, and in the other to force the student to pay attention, were without malice, related to maintaining school discipline, and not physical abuse of constitutional proportions.

A civil rights action alleging the physical and sexual assault of handicapped students was brought against a Missouri special school bus driver, the school district, and district officials.[84] The court held for the district and its officials in both their individual and official capacities.

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83. Cole v. Newton Special Mun. Separate School Dist., 676 F. Supp. 749 (S.D. Miss. 1987).

84. Jane Doe v. Special School Dist., 682 F. Supp. 451 (E.D. Mo. 1988).

The plaintiffs had not shown a failure to adequately supervise or train subordinates. To do so a plaintiff must show that (1) the official received "notice of a pattern of unconstitutional acts" committed by subordinates; (2) the official "demonstrated deliberate indifference [to] or tacit authorization of the offensive acts;" (3) the official failed to take sufficient "remedial" action; and (4) the official's failure proximately caused injury to the plaintiff. However, allegations made on behalf of the abused students and students who witnessed the abuse were found sufficient to state a claim of action against the driver for violation of the students due process rights.

An Ohio high school student was expelled for the remainder of a semester following his alleged possession and attempt to sell a marijuana cigarette. His assertion of a denial of his due process rights was not recognized by the district court. The Sixth Circuit Court of Appeals reversed that decision on the basis that the student was not given the chance to rebut evidence disclosed to the board of education.[85] Specifically, evidence presented by a guidance counselor during the closed portion of the school board meeting amounted to a clear deprivation of the student's right to procedural due process of law.

A New York Orthodox Jewish student brought suit against the board of education to enjoin the scheduling of graduation exercises on Saturday. Such scheduling, the student claimed, would violate his first amendment right to freely exercise his religion. The board of education appealed the district court decision enjoining the scheduling of the exercises.[86] In reversing that decision, the court of appeals explained that in a pluralistic society it is impossible for government to accommodate every need of every religious group. The court concluded that attending the graduation exercises was not a prerequisite to the student receiving his diploma. The exercises were not seen as an important benefit conferred by the state and therefore attending them was not protected by the free exercise clause of the first amendment.

Comparing a student's right to be free from sexual abuse with the established right to be free from physical abuse, the Third Circuit Court of Appeals upheld a district court decision denying summary judgment to a Pennsylvania school district.[87] A female member of a high school band brought the action for injuries arising from sexual assaults by the band's director. In remanding the case for further action, the court explained that immunity under state law does not detract from the existence of a common law duty, or potential liability under section

85. Newsome v. Batavia Local School Dist., 842 F.2d 920 (6th Cir. 1988).

86. Smith v. North Babylon Union Free School Dist., 844 F.2d 90 (2d Cir. 1988).

87. Stoneking v. Bradford Area School Dist., 856 F.2d 594 (3d Cir. 1988). *See* Sowers v. Bradford Area School Dist. (where another student successfully raised constitutional issues stemming from sexual abuse by the band director).

1983. Based upon the reports of incidents of sexual misconduct by the band director, it was determined that the school officials knew, or should have known, that female band members faced a special danger. The court held that these circumstances placed a constitutional duty upon the officials to investigate and take reasonable steps to protect the students.

The constitutionality of a Texas statute allowing corporal punishment was examined in a case involving the paddling of two elementary schoolgirls. Each girl was given two swats by the principal for "snickering" in the hall. Shortly afterward, the girls each received three additional swats from their teacher for "snickering" in class. Social workers who examined the plaintiff's bruises stated that the situation constituted child abuse. The civil rights action against the principal, superintendent, and teacher sought monetary damages for the infliction of injuries. The action was dismissed by the trial court, and appeal was sought.[88] In upholding the dismissal, the court noted that Texas provides common law remedies which serve to deter unjustified or excessive punishment and redress that which may occur. Citing that history is filled with examples of mistreatment, the plaintiffs argued that children are a group at risk. The court failed to recognize that contention, explaining that the type of intermediate scrutiny sought has only been applied previously to classifications based on gender, legitimacy, or alienage. Thus, the court applied a rational-basis review of the Texas law. Under such a review, the court presumes state legislation to be constitutionally valid. The Texas law was found to be reasonable in the light of its purpose, and bore a rational relationship to the objective of maintenance of discipline and order in public schools.

Employee Initiated Cases

A civil rights action against the school committee was brought by a Massachusetts principal. Following several incidents of alleged poor judgment, the principal was required to submit to a psychiatric examination and was later demoted when his school was closed. The action alleged a denial of the principal's rights to privacy and liberty as guaranteed by the fourth and fourteenth amendments. The court of appeals upheld the trial court's contention that, in ordering the examination, the committee was merely seeking to insure that if the principal returned to work he would not jeopardize the school system's interest in providing a safe and healthy educational environment.[89]

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88. Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988).

89. Daury v. Smith, 842 F.2d 9 (1st Cir. 1988). For a discussion of civil rights claims derived from the firing of local school officials see Courtemanche v. Enlarged City School Dist., 686 F. Supp. 1025 (S.D.N.Y. 1988).